recommends that joint construction be permitted in all instances subject, if the Commission so desires, to filing the pertinent contracts with the Commission.

IV. PREFERENTIAL ACCESS/RATES

In its Second Report and Order, the Commission declined to grant preferential access or rates to purveyors of content catering to or held to be involving the Public, Educational and Government ("PEG").[25] U S WEST believes that the Commission's decision was the correct one. Nevertheless, the Third Further Notice seeks additional comment on whether certain classes of users must or may obtain preferential VDT common carrier access or rates, based on the assumption that the particular content they would transmit would be particularly valuable.[26]

U S WEST believes that the Commission's current decision is soundly based in both the law and public policy. To deviate from the instant position is fraught with peril, not only from a First Amendment perspective but from an implementation one, as well.

---

[25]See Second Report and Order, 7 FCC Rcd. 5804-05. In the Third Further Notice the Commission refers to these kinds of providers/programmers as those seeking access for "noncommercial and other nonprofit programming." Third Further Notice ¶ 246.

[26]Id. ¶¶ 283-84.

A. Preferred Access

Some content providers, such as PEG program providers, believe that they should have some kind of "preferred access" to channel capacity. In this way, theoretically, they will be assured that there is PEG programming on the VDT distribution system before any capacity problems actually surface, so that if and when they do, PEG programming will already have a foothold. No matter what the merits of the programming proposed by these entities, the notion of the Federal Government becoming involved in establishing standards for preferred speech is so fraught with constitutional peril that the Commission would need a very powerful record to have any chance at all of sustaining such a regulatory structure in the face of legal challenge. No such record exists.

As a matter of First Amendment jurisprudence, regulatory access requirements or mandates have been reserved for those technologies that either suffer from a constrained technological capacity (such as broadcast)[27] or demonstrate attributes of monopoly provisioning.[28] Neither is the case with VDT service.

But in addition to the purely legal problems associated with petitioners' requests is the matter of U S WEST's interests in offering VDT as a common carriage service. U S WEST will be providing a common carriage, content-neutral

[27]See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[28]See Turner Broadcasting, 114 S. Ct. at 2456-58, 2466, 2469-70.

VDT platform. We have no interest in becoming involved in what would clearly be an administrative nightmare to determine "who" is a legitimate "noncommercial or nonprofit" programmer, or "what" is PEG programming,[29] or to devise a system of either "percentage of capacity" or "number of program" set asides for those arguing that preferred access is in the public interest.

Furthermore, VDT offerings are not yet even off the ground and it is impossible to tell whether they will fulfill a market need or will be a total failure. It is impossible to tell whether they will meaningfully increase the programming choices available to the American people. It is too early to discern how a VDT regime "guided by the core objectives of nondiscrimination and equal access" would fare.[30] But, as those are two of the fundamental objectives and key characteristics of common carriage, it is certainly worth testing the legitimacy and success of a VDT offering within the context of such principles. It is clearly impossible to predict -- at this early point in time -- that the absence of mandated-preferred access on VDT platforms "will likely deny the American public meaningful access to noncommercial and other nonprofit programming."[31] Nor is it possible to predict that the existence of such regulation will actually add to the overall availability of such programming. This is especially true in light of the fact that there already

---

[29]Essentially, U S WEST has no interest in exercising the kind of "editorial control" over the programming of others that commentors, such as NCTA, suggest a preferred access regime would entail. See Third Further Notice at ¶ 253. Should U S WEST provide its own programming over the facilities over which VDT is offered, it shall do so in compliance with all applicable laws.

[30]Second Report and Order, 7 FCC Rcd. at 5802 ¶ 38.

[31]Third Further Notice at ¶ 246.

exists a multiplicity of programming; that VDT providers are not the entrenched video-distribution providers; and that video-distribution technology is becoming more varied and more available every day.

The fact that the Commission itself has, on numerous occasions, within the context of broadcast television (and, more recently, cable television), waxed eloquently on the special nature of noncommercial or PEG programming, and has worked to implement Congressional mandates with regard to preferential treatment for such programming, does not mean that the Commission would be acting in an arbitrary or capricious manner in not mandating such preferences in the context of VDT (or that such a mandate would be lawful or wise).[32] Neither the legal framework nor the First Amendment principles relevant to broadcast (or even cable) television are on the side of a governmentally-mandated preferential access regime on VDT.

First, a preferred access structure applicable to "noncommercial," "nonprofit" or PEG programming most certainly cannot be deemed "content neutral." PEG channel provisions are explicitly content based. See Preferred Communications, Inc. v. City of Los Angeles, No. CV83-5846, slip. op. at 26-29 (C.D. Cal. Jan. 5, 1990) (invalidating PEG access requirements because they are content-based and "defendants do not explain with any specificity how or why the City decided to require allocation of eight access channels instead of fewer"), appeal 13 F.2d 1327,

[32]Compare Third Further Notice at ¶ 247, where the Commission cites to commentors seeking to extrapolate from earlier Commission precedent to a VDT environment, arguing that a deviation would be arbitrary or capricious.

1333 (deciding that it was precipitous to address the constitutional challenges associated with PEG mandates). See also Century Federal, v. City of Palo Alto, Cal. 710 F.Supp. 1552, 1555 (N.D. Cal. 1987) (PEG mandates are content based and unconstitutional); Group W Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954, 968-69 (N.D. Cal. 1987) (PEG mandates are content based and unconstitutional). A programmer's ability to avail itself of such provisions depends entirely upon the "public, educational or governmental" content of its programs. Compare Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) (tax exemption of religious, professional, trade and sports magazines held content-based). Therefore, a mandate to provide such access can only be constitutional if the government can demonstrate a compelling interest in the mandate itself. Century Federal, 710 F.Supp. at 1555. Thus, any mandated access requirement imposed on VDT platform providers clearly insinuates the government in the role of preferring one type of content over another -- an odious and constitutionally suspect role for the government to play, even in the best of circumstances.

Second, a mandated access preference would interfere with U S WEST's decision to be content-neutral, a la general common carriage principles. Such action would, then, force U S WEST into a particular model for carrying speech which it does not currently want to pursue or endorse.

Third, a preferred access regime could reduce the opportunities for those with no preferred status to speak via the common carriage network. No permissible

governmental interest is served by burdening the speech of one group (or groups) in order to promote the speech of others.[33]

While certain technological or market phenomena, such as scarce spectrum or a single video distribution system into the home, may accord Congress or this Commission greater deference in the matter of regulation of speech and its distribution technologies, VDT service bears none of the hallmarks that would render such increased discretion appropriate.

B. Preferential Rates

While U S WEST believes that it would be unlawful for the Commission to mandate preferred access to VDT platforms, the suggestion is also proffered that the Commission impose a preferred rate structure for certain programming and the providers of such programming. As stated by some commentors, the argument is that "if public broadcasters are required to pay marketplace rates for [VDT], they either will be unable to participate in [VDT], or they will be limited to providing programming that will generate sufficient revenues to cover costs."[34]

Such assertions are totally undemonstrated. They are made devoid of any proffered evidence of the "rates for [VDT]" and with no demonstration that such rates can or cannot actually be paid. Certainly, in the absence of such evidence, i.e.,

---

[33]See Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. at 14-15; see also Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam).

[34]Third Further Notice at ¶ 249. Others ask for reduced rates for other reasons. See id. at 251 (NAB asking for reduced rates for local programming).

in the absence of any demonstrated "harm," the Commission need devise no program to correct the non-existent problem. Of course, in the absence of a solid factual record, governmental support for certain preferred speech content via lower carrier rates is also highly constitutionally suspect.

U S WEST does support, however, the concept proffered by Bell Atlantic, i.e., that it is not prima facie unreasonable for a VDT platform provider to establish, on its own and based on its own business initiatives, an offering reflecting different (and, in some circumstances, preferred) rates.[35] Whether or not such a scheme would amount to an "unreasonable" discrimination is obviously something that the Commission would have to study during the proceedings focused on that particular carrier's offering (i.e., the tariff proceeding).

While "the continued availability of diverse sources of programming clearly serves the public interest,"[36] there has been no "compelling showing of need [or] strong public policy"[37] reason advanced to support Commission intervention in the otherwise content-neutral policies of common carriers in their provision of VDT service. Indeed, a decision by the Commission to grant either preferred access or preferred rates would undoubtedly embroil the Commission in complex,

---

[35]See Third Further Notice at ¶ 253 and n.479. The difference between such voluntary action and the forced access regime suggested by certain commentors is critical. For example, even if newspapers cannot be compelled to publish "replies" to articles or editorials, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), they routinely do so via letters to the editor and "corrections" columns.

[36]Third Further Notice at ¶ 254.

[37]Id. at ¶ 255.

constitutional litigation for some time to come. In the absence of any demonstration that VDT service will do other than provide opportunities for additional, more diverse programming, the Commission should decline to intercede on behalf of those seeking preferential treatment.

V. POLE ATTACHMENTS AND CONDUIT RIGHTS

The Third Further Notice asks whether a VDT applicant should be required to make a declaration as to pole and conduit availability to the same effect as such a showing must be made as part of a Section 214 application to provide channel service to cable operators.[38] The Third Further Notice ponders whether "LECs have the incentive and ability to leverage their control over pole attachments or conduit rights to prevent facilities-based competition by video programmers to the LECs' video dialtone platforms."[39]

There are several reasons why any such rule would not be wise. The connection between a "facilities based video programmer" and a U S WEST based video dialtone platform would necessarily be a high capacity circuit. These circuits generally do not utilize telephone poles. Moreover, high capacity transport providers are flourishing today without any pole or conduit rules by the Commission. Frankly, such space does not constitute an essential facility under any relevant economic doctrine and there is no need for a conduit rule to protect facilities based

[38]Id. ¶ 285; see also 47 CFR § 63.57.

[39]Third Further Notice ¶ 285.

video programmers. In other words, LECs have no realistic ability to prevent, or significantly impede, development of competition by facilities-based programmers.

Moreover, there is a serious problem inherent in such a rule: Who would be entitled to pole or conduit space under the rule? As we envision it, a "facilities based video programmer" will be more likely to purchase high capacity circuits from competitive carriers, who already access U S WEST's networks. Any rule to protect facilities based video programmers would of necessity create a special based class of such carriers who would be entitled to the benefit of the rule. This class of U S WEST customers would then be entitled to more or less rights vis-a- vis U S WEST's poles and conduits based on the content which they carried over their own facilities. Regulation of access to LEC or power company controlled poles and conduits (or, increasingly, those controlled by cable companies or interexchange carriers) is a subject of potentially immense complexity. Creating a pole or conduit

preferred access class based upon content would not promote rational study of the issue, and indeed would raise serious constitutional issues.

Respectfully submitted,

U S WEST COMMUNICATIONS, INC.

By: _____

Robert R. McKenna
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
303/672-2861

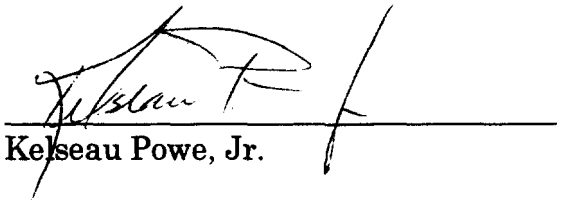
Its Attorney

Of Counsel,
Laurie J. Bennett

December 16, 1994

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 16th day of December, 1994, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served via hand-delivery upon the persons listed on the attached service list.



Kelseau Powe, Jr.

(CC87266.bm/lh)

James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, N.W.
Washington, DC 20554

Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

International Transcription
Services, Inc.
Room 246
1919 M Street, N.W.
Washington, DC 20554

Meredith Jones
Federal Communications Commission
Room 918
2033 M Street, N.W.
Washington, DC 20554